FILED
OCT 27 1952

In The
Supreme Court Of The United States

No. 192.

GEORGE H. TAYLOR
Petitioner

versus

COMMONWEALTH OF KENTUCKY
Respondent

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

JOHN L. DAVIS,
Of Stoll, Keenon & Park,
Lexington, Kentucky.

WM. MARSHALL BULLITT,
Of Bullitt, Dawson & Tarrant,
Louisville, Kentucky.

H. V. FORSYTH,
Ashland, Kentucky.

ROBERT G. CABELL,
Of Tucker, Mays, Cabell & Moore,
Richmond, Virginia.

ALEXANDER H. SANDS,
Of Sands, Marks & Sands,
Richmond, Virginia.

In T
Supreme Court Of T United States

No. 19

GEORGE H. TAYLOR
Petition

versus

COMMONWEALTH OF KENTUCKY
Respondent

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI

Comes now the Petitioner, George H. Taylor, by Alexander H. Sands, his counsel, and respectfully petitions this Court to vacate its order entered herein on October 13, 1952, denying Petitioner's petition for writ of *certiorari*, and, for the reasons and upon the grounds herein stated, grant such petition for certiorari under Rule 33.

The grounds assigned and relied upon are as follows:

Notice of the filing of brief for respondent in opposition to the petition was not timely given (Rule 38, Revised to December 1, 1951). Rejection and non-consideration thereof by the Court should have been the consequence as we interpret this Rule, and no re-

ply was filed on behalf of Petitioner. Whether consideration was given to the brief in opposition by the Court in determining its action upon the petition for *certiorari* is not known, but if consideration was given, with respect we bring to the attention of the Court observations herein which we deem pertinent and proper as bearing upon the facts and principles of law claimed or asserted in such brief.

The brief states on page 3: "* * * and in 1911 it (the cause) was stricken from the docket of the Pike Circuit Court". (Parenthetical matter supplied). Such statement does violence to the established facts found in the Record and is contrary to the finding of the Kentucky Court (246 S. W. (2d) 984). If the statement alluded to was true (assuming as a matter of course that the Court had acted after due notice at the time to Taylor and there was none) legal and moral justification for the application of the equitable doctrine of laches might exist, as by his own *in pais inertia*, could in many cases be appropriately denominated and construed as due process of law and the taking of Petitioner's property could be constitutionally justified. But even under such circumstances, if a court of equity, in the administration of an equity case has sequestrated the property of a litigant, such as was accomplished in the instant case, passive acquiescence on the part of the litigant, such as is now claimed by the respondent against the Petitioner as having occured, would not, and could not, in this Court be construed either as a fulfillment of due process requirements, or, alternately as the annihilation of the defense of due process. *Taylor* v. *Carryl*, 20 How. 583; *U. S.* v. *Lawton*, 110 U. S. 146.

The present cause, however as the record shows at all times remained on the Kentucky court's docket, with the

duty of concluding the litigation resting squarely on the shoulders of the Commonwealth. If the Commonwealth intended to abandon the litigation during the ensuing years, equity and good conscience clearly would demand some notification thereof to the Petitioner, whom it had voluntarily brought into the litigation and whose property it had sequestrated. No such notice was given.

The Kentucky court's decision in the present instance rested solely upon laches and such not only erroneously applied this doctrine to the detriment of the rights of a litigant upon whom there was no duty to proceed but of greater importance to a Federal Court deprived Petitioner of his rights in the pending litigation to share in the proceeds of sale of the forfeited lands, in violation of his rights guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States as expressly held by this Court in *U. S.* v. *Lawton, supra.*

Proceeding under the belief that this Court heretofore determined to deny the petition for certiorari under the mistaken conception, created by respondent's brief and the inapposite authorities cited which deal with laches *in pais*, that the relief sought by Petitioner is from a final adjudication of the Kentucky court rendered in the year 1911, rather that an adjudication in a pending cause, Petitioner respectfully requests that reconsideration be given to his petition, and that an order be now made rescinding the order herein entered on October 13, 1952, which denies him a writ of *certiorari* as prayed.

Acting upon the assumption that this Honorable Court may have considered the respondent's brief in its deliberations in acting upon our petition for writ of *certiorari*, we ask the indulgence of the Court on behalf of Mr. Taylor the consideration of the following observations, as a reply to such brief.

The short reply of respondent carries two headings, namely, (1) "No Grounds Exist Herein For The Granting Of Certiorari" and (2) "The Merits Of The Case". As the principal authority relied upon in each instance is the decision of Mr. Justice Brewer, reported in *Moran* v. *Horsky*, 178 U. S. 205, we may treat both points as one. It is our contention however, that this case sustains our theory of the case; as likewise does the case of *Gibson* v. *Chouteau* 13 Wall. 20 (80 U. S.) 20 L. Ed. 534.

It is first contended by Respondent that the decision rendered by the Kentucky Court in the instant case turns solely upon the construction of the doctrine of laches and consequently such involves no Federal question. We quote from counsel:

> "Such decision involved only the construction of *a state statute*, and the determination of *the law of the state*, i. e., whether the asserted right of the petitioner was barred by the defense of laches." (Italics supplied)

The brief cites no Kentucky statute as governing or bearing upon the questions. In fact, there is no Kentucky statute defining laches; and counsel furnish no Kentucky case to support the proposition that the common law or case law of the State of Kentucky is in accord with or supports the decision here brought under review unless the decision rendered by the Court in this case in December 1951, can be accepted and taken as a reversal of the previous decisions of the Kentucky court, cited with approval by the Court, found in the former opinion of Judge Rees (Record page 42 at p 44). In the former opinion Judge Rees says:

> "Delay alone is not sufficient to constitute laches."

The authorities cited by him amply sustain this point as well as the corollary which follows:

> "It must be delay that works disadvantage to another."

Then follows his review of the case and his concept of the law of laches as previously understood by the courts at large, and it holds that the State of Kentucky, the plaintiff in this cause, has not been injured, nor any other party of interest therein affected.

In the second opinion rendered in the case, the opinion now under review by this Court, Commissioner Stanley introduces an altogether new theory as to the rights of those who may be considered and affected in a chancery cause when instituted by a sovereign state, and differing from Edmund Burke, he includes the whole Commonwealth. His concept is very broad. He cites no decision in its support and we have found none. That there may be no mistake through paraphrasing, we ask the indulgence of the Court to quote from page 987 (240 of S. W. (2nd), page 987).

> "That which the Commonwealth, acting as sovereign of all the people, achieved through the travail of years of legislation and litigation, namely, clearing the confusion of titles, would, in a large measure, be lost. *The Commonwealth has the same sovereign power now to represent the people to conserve that accomplishment.* The policy of the state is to stabilize titles. Upon that rests security and prosperity, a matter of primary concern. How then can it be said that the element of prejudice to the Commonwealth is lacking so that the presumption of an abandonment and acquiescence by the appellant should not prevail?" (Italics supplied)

If this concept of the law now for the first time advanced can be adopted and considered sound, are we not brought to the irresistible conclusion that there was no necessity for the State of Kentucky to have adopted the Forfeiture Act of 1906? Can it seriously be considered that the positive requirements of this law which was held constitutional solely upon the ground that the State of Kentucky afforded to the holder of the Virginia grant involved a course of procedure resting upon "office found" or its equivalent, would it not of necessity be followed, or that petitioner's rights would be protected by this Court when such procedure had not only not been followed but was abandoned?

The question therefore as to what circumstances in an ordinary case justify the application the defense of laches is not here involved, and furthermore, as we read the single case brought to the attention of the Court in the reply brief, namely, *Moran* v. *Horsky, supra,* Justice Brewer recognized the distinction existing between lands or grant actually held by a sovereign state and such as were in the process of being acquired. This view is strengthened by the opinion found in the case of *Gibson* v. *Chouteau,* 13 Wallace, 92.

The question as to what circumstances would or would not justify the application of the doctrine of laches in an ordinary case is more or less a ***non sequitur*** in the present instance. Certainly it is wholly inapplicable if this Court should arrive at the conclusion that the action and procedure followed by the State of Kentucky when successfully accomplishing the forfeiture of the Virginia grants must be considered as governed and controlled by its own statutes expressly designed for such purposes when fortified by the several decisions of this court which recognize the necessity for the equivalent of *office found,* such decisions commencing with *Fairfax's Devisees* v. *Hunter's Lessee* (1913), 7 Cranch 602, and extending through *Bennett* v. *Hunter,*

(1870), 9 Wall. 326. The issue of laches or no laches can have no bearing upon the subject involved for if it be conceded, as it must be conceded under these decisions, that the sale of the subject matter, or grant, is a *sine qua non* for the *passing of title to the State of Kentucky* there could be no change in the relationship of the parties until such sale had been made.

This question necessarily involves a constitutional question respecting the effect or fulfillment of due process of law, and hence no situation could arise in the state court involving a question of laches until the condition precedent, namely, the sale provided under the Act of 1906, has been had.

For the foregoing reasons Petitioner, by his counsel, respectfully requests an award of a writ of certiorari.

ALEXANDER H. SANDS,
Counsel for Petitioner.

JOHN L. DAVIS,
Of STOLL, KEENON & PARK,
Lexington, Kentucky.

WM. MARSHALL BULLITT,
Of BULLITT, DAWSON & TARRANT,
Louisville, Kentucky.

H. V. FORSYTH,
Ashland, Kentucky.

ROBERT G. CABELL,
Of TUCKER, MAYS, CABELL & MOORE,
Richmond, Virginia.

ALEXANDER H. SANDS,
Of SANDS, MARKS & SANDS,
Richmond, Virginia.

I, Alexander H. Sands, Attorney for Petitioner George H. Taylor, do certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds specified therein.

ALEXANDER H. SANDS,
Counsel for Petitioner.

October 24, 1952.